Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1993

EGB ASSOCIATES, INC., a New York Corporation;
CHARLES R. HART, Citizen of New York;
DONALD F. HART, Citizen of New York;
BRIAN HART, Citizen of New York;
WILLIAM D. HART, Citizen of New York,
Petitioners,

v.

TCBY SYSTEMS, INC., an Arkansas Corporation;
TCBY ENTERPRISES, INC., a Delaware Corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the United States Constitution pursuant to Amendment 14, Subdivision one and admendment five require a District Court or any Court to afford an individual a "Fact Finding" or "Plenary" hearing before determining substantial property rights when underlying issues of fact are thereby determined?

LIST OF PARTIES

The parties to the proceedings were the petitioners, EGB Associates, Inc., Charles R. Hart, Donald F. Hart, Brian Hart, William D. Hart, a New York Corporation and New York State residents repectively.

The respondents before this Court include TCBY Systems, Inc., TCBY Enterprises, Inc. and Arkansas Corporation and a Delaware Corporation respectively.

Petitioners have no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioners, EGB Associates, Inc. et al, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled proceedings on August 16, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit, reported at 2 F. 3rd 588, is reproduced as Appendix A to this petition.

The opinion, judgment and order of the United States District Court for the Eastern District of Arkansas Western Division, is reproduced as Appendix B, to this petition.

GROUNDS FOR THIS COURTS JURISDICTION

The judgment of the United States Court of Appeals, for the Eighth Circuit was entered on August 16th, 1993. By Order dated the 17th day of November by Honorable Harry A. Blackman the time for filing a petition for a writ of certiorari was extended to and including December 14, 1993. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AMENDMENTS INVOLVED

This case involes the Due Process provisions of The United States Constitution Amendment Fourteen Subdivision One and Amendment Five.

STATEMENT OF THE CASE

The petitioners in this case are members of the same family living in the town of East Greenbush a suburb of a Tri-City area, namely Albany, Troy, & Schenectady of New York State.

The Respondents are recognized as an international corporation that wholesales and retails a food product known as yogurt. The respondents advertised for and actively solicited franchisees to open stores and sell their product.

The Petitioners formulated a group and responded to the ads of TCBY to open stores under franchise agreements and with the assistance of TCBY to market the product. Representatives of TCBY stated that they were experienced in marketing this product and presented to your petitioners projections showing a growth potential in the Northeast

corridor and that your petitioner would be designated as the pilot for the Northeastern quadrant of the United States. After reading sales brochures, attending meetings and presentations, the petitioners entered into franchise agreements for the opening of certain stores that were designated by TCBY as to location in upstate New York, commencing with a single store.

The total number of stores that were opened by the petitioners were seven. After opening the stores and signing franchise agreements, your petitioners were lead by TCBY to formulate a corporation which they in fact did upon the understanding that the corporation would insulate them from personal liability even though their guarantees were to be affixed to the franchise agreement.

To obtain the leases of the stores and furnish the same and pay the franchise fees to TCBY, your petitioners invested approximately the sum of $850,000.00 dollars by borrowing their savings, obtaining equity loans and liquidating what capital they could as well as obtaining bank financing.

For a relatively short period of time or a period of one year, several of the stores began showing a modest profit, while others were showing none, and as the stores continued in business it became quite apparent that your petitioners were unable to rely upon the representations of TCBY or obtain any assistance in sales, organization, employee assistance, or marketing. TCBY neither utilized its programs of advertising in the Northeast Regional Corridor, nor did they advertise at that juncture on a national basis. At this time some of these stores were closed and mutual releases

were obtained between the parties and TCBY[1] and two of the closed stores that were mutually released were part of the instant litigation by TCBY.[2]

To recoup some of their losses, the individual petitioners decided to diversify some of their operations to another restaurant business known as Eats and Sweets, where a larger quantity and variety of products were being sold to the consumers. The petitioners were finding that they could not solely rely upon the products of TCBY to obtain a profit, but that other products had to be given to the consumer as well. Towards the end of closing their operations, TCBY became insistent that only their product could be sold even though it was not making a profit, and even though there was no assistance (as provided in their franchise agreements) given by TCBY to assist your petitioners to formulate a profit.[3]

Accordingly, TCBY instituted an action against your petitioners, New York State residents, alleging Breach of Contract (Franchise Agreements) and the failure to pay for certain product, royalty fees, advertising fees, and also

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1. This in itself raising questoins as to the legal status of the individuals ie., whether they were sureties and liable only after corporate liability was established, makers or co-makers, guarantors of payment, performance or both.

2. Affirmative defense of release was never on pled on behalf of EGB. The answer to the complain of TCBY.

3. This formulated substantially the total basis of the action on behalf of TCBY.

alleging violation of some clauses of the contact i.e; Non-Competition, Failure to Indentify, Breach of Guarantee as well as Trade Mark Infringement, False Designation of Origin, and Arkansas Antidultion Act. It was initiated in U.S. District court in Arkansas.

The leader of the EGB group, namely Charles Hart, obtained the services of an attorney in Arkansas to represent them in the hopes that this matter could be resolved, and furthermore in the hopes that they could recoup some of the monies that they had spent in reliance upon the the representations of TCBY, when they in fact purchased the franchises. (Initially, a general denial was prepared by the Attorney in Arkansas and the action scheduled for purposes of discovery, and placing the matter down for trial.) To the knowledge of your deponents, there was no further discovery on behalf of your petitioners and when it came to their attention that very little if anything would be done regarding this law suit that the same should be settled for the sum of $28,000.00 with reservations of any claims they would have against TCBY. This appeared to be to the satisfaction of your petitioners as long as the claims to the substantial damages they had suffered could be pursued at a future date when they could obtain counsel that would be willing to pursue the matter. They consulted with another attorney in Arkansas who indicated that he would be willing to pursue their claim against TCBY.

The individuals consulted a New York State attorney, your counsel herein, who prepared an amended answer with set-offs, affirmative defenses and counterclaims and presented the same to the U.S. District Court for the Western District of Arkansas Eastern Division, moving the court to allow the amended the complaint with affirmative defenses, set-offs and

counterclaims. At the same time the attorneys for the respondents moved this court for an order determining that this matter had been settled as between the attorneys. The motion of the respondents was granted and hence the appeal to the court of appeals for the Eighth Circuit in St. Louis, Missouri, which your counsel for the petitioners attended and argued.

Counsel for the petitioners argued in the District Court of Arkansas that it was never the intent of EGB Associates, Inc. or the individuals to settle this claim in its entirety including the counter claims and waive any of the affirmative defenses which included releases by and between the parties or any affirmative defenses that existed between the parties. Hence, the amended answer with the set-offs, affirmative defenses and counter claims was presented to the district court for its consideration in hopes that the same would be entertained and allowed and counsel for the petitioners took the liberty of becoming admitted in the District Court in Arkansas for the purposes of representing the petitioners herein. In the alternative, counsel argued that a hearing should be held to determine the authority of the attorney in settling this matter, and also the intent of the parties in settling it as it was the expressed intent of your petitioners that settlement at all, if reached would be only as to the immediate claim of TCBY. Contrary to this reasoning the District Court allowed the settlement and directed the corporation along with its corporate officers to execute general releases to TCBY. It was at this juncture that counsel sought the assistance from the Court of Appeals for the Eighth Circuit and appealed this matter.

The Decision and Judgement of the Eight Circuit Court of Appeals submitted April 13, 1993 and filed

August 16, 1993 was a determination among other things that the releases proposed by the respondents did not have to be executed by your petitioners but that the case in fact settled all issues for the sum of $28,000.00 with prejudice thereby involving the compulsory counterclaim statute as contained in the Arkansas Statue and also under Federal Rules of Civil Practice 13(a). On page four (4) of the decision, the court quoted, " We agree with EGB that Crass's reply was not an acceptance but a counter-offer, which EGB rejected."

The gravaman of that proceeding will be set forth in a cursory manner. The Arkansas attorney for your petitioners indicated by letter to TCBY that it would offer $28,000.00 to settle this matter and then the reply of Crass (attorney for TCBY) indicated not an acceptance, but a counter-offer. The opinion of the Eight Circuit then states that EGB rejected the counter-offer. In effect therefore, it states that there was no contract formulated or stipulation of settlement entered into.

The decision of the court, it will be argued, is inconsistent, when the court then found that EGB did agree to dismiss a lawsuit with prejudice for $28,000.00. It is interesting to note that on appeal, the issue was raised as to the necessity of an evidentiary hearing to explore in district court the intent of the parties in arriving at what may appear to be a settlement. Such an evidentiary hearing was never held. The determination of the Court of Appeals that there was an offer and counteroffer is inconsistent with the determination of the District Court that there was an offer and acceptance. Both determinations are opposing and based upon the same set of facts or lack thereof.

REASONS FOR GRANTING THE WRIT

This case presents an issue of far reaching implications that demands an ultimate determination. Our laws must rest upon believable facts determined by a judge or jury before legal principles can even be invoked or applied. In this particular case, there was a purported settlement of a case based upon two letters for opposing counsel. This conduct pre-supposes that both attorneys are acting as agents for their clients who then are principals. This concept dramatically exceeds the well understood principles of attorney and client and involves all the principles of principal/agent.

The authority of any agent either must be disclosed or his authority established; or anyone dealing with such an agent does so at his own risk and the principal may disaffirm such an agreement if the agent is not "cloaked" with such authority. An attorney at law is not by that relationship an attorney-in-fact. The gravaman of this action is whether a settlement had been effected.

The respondents contend that there was a settlement, and based upon the aforesaid letters between the attorneys for the clients, the district court determined that there were no issues of fact, that the documents (2 letters) were clear and unambiguous and the statue relating to compulsory counterclaims should apply (hence, with prejudice).

The Court of Appeals, on the other hand, stated that the letter of petitioners attorney was an offer; Crass's letter was a counteroffer, and hence no agreement or settlement was effected, yet, this court inexplicably, afffirmed the operative portions of the District Court's decision regarding a settlement.

It is submitted that Due Process in this case has been denied your petitioners and the writ shoudl issue.

A. The Eight Circuits Decision affirms a denial of Due Process and is at variance with decision of this court and other ciruits.

We submit that the reasoning of the Court of Appeals is flawed and submit that before any court can apply agency or contract principles that:

a. The authority of the agent is established and then,

b. There was a meeting of the minds with consideration for the formation of the contract.

Due Process must dictate a hearing with cross-examination to investigate the above two questions before any legal finding or ruling can be made, otherwise any court is constrained to speculate. Such speculation violates Due Process.

1. There seems to be a divergence of opinion within the ciruits as to what constitues a settlement.

2. It is axiomatic that a settlement agreement should conform to the tradiutional principles of contract law. See: Sharp v. Executive Industries, Inc., 760 F. Supp. 1269. It should therefore be axiomatic that the existence of such an agreement as well as its terms should warrant an investigation or a hearing. See: Gatz v. Southeast Bank, 836 F. 2d 1089, 198, even

> if after formation its terms are not clearly understood.

The formalities necessary to formulate an agreement or contract of settlement may differ among the jurisdictions but one thing remains clear and unambiguous it is that there must in fact be an agreement or "Meeting of the Minds."

In Gatz v. Southwest Bank of Maha, 836 F.2d 1089 at 1095 (8th Cir 1988) provides: "The District Court must hold a hearing, however, when there is a substantial factual dispute concerning the existence* or terms of the settlement agreement." The case of David v. W[illegible], 586 A.2d 775 (MD. App. 1991) echoes the same and pr[illegible]edes at page 782; "We hold a hearing on a motion to enforce a settlement agreement, when the existence of this agreement is contested, is not a routine motions hearing. Where the agreement itself is contested, we hold that a full plenary hearing is required. The authorities in other jurisdictional are generally in accord." In Massachusetts Casualty Insurance Co. v. Forman, 469 F.2d 259 (5th Cir. 1972), modified after remand, 516 F.2d 425, reh. denied, 522 F.2d 1383 (5th Cir. 1975) cert. denied, 424 U.S. 914, 96 S.CT 1114, 47 L. Ed. 2d 319 (1976), a hearing was held on Forman's Motions to Compel Settlement in accordance with agreement between counsel. That court stated:

> "Where material facts concerning the existence of an agreement to settle are in dispute, the entry of an Order enforcing an alleged agreement without a plenary hearing is improper.

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* Asterisk and underlining provided by counsel.

> From the meager record... consisting primarily of unsworn statements by opposing counsel, it is clear that a material dispute of fact existed.....{9}"

Both parties should be given a full and fair opportunity to prove their version.... As Attorney Cushman lamented to the court below, absent the opportunity to contest in an adversary proceedings, allegations that a settlement has been reached "[i]t appears to be very dangerous to talk to (opposing) counsel."

It is suggested that such a hearing, if conducted, could have a factual basis on which to make the determination Vel non if either attorney acted as agent or outside his representation as attorney-at-law had authority and the limitations placed upon that authority, if any.

The case at bar is more akin to the case of Callie v. Near, 829 F. 288 (9th Cir 1987) where at page 891 the court stated:

> "During the arguements on the Motion for Entry of Judgment, the district judge observed that there was no "indication that [the June 9th letter] was subject to the preparation of any documents." However, circumstances of the settlement negotiations could defeat such a conclusion. See Fulgence v. J. Ray McDermott & Co. 662 F.2d 1207, 1209 (5th Cir. 1981); Pyle, 354 F. Supp. at 353; Britt v. Thorsen, 258 Or. 135, 418 P.2d 352.354 (1971).

In fact, in their brief, opposing Callie's Motion for Entry of Judgment, the appellants allege that the parties' intent only to be bound upon the execution of a written signed agreement was set forth in the correspondence between the parties. Although the district court acknowledged this problem of intent during the arguments on the Motion for Entry of Judgment, the arguments did not clarify this issue. Accordingly, the district court erred in failing to conduct an evidentiary hearing regarding the intent of the parties. The case of Boyd v. Larco, 356 F. Supp 917 (U.S. District Court, Western Division, Ark. 1973) can easily be distinguished on the basis that the relief of summary judgment was made after a hearing and finding that the settlement had been accepted and concluded by the general contractor who then changed his mind. The Court also found that there was no mutual mistake and it has been the position of the defendants that mutual mistake was the gravamen of their opposition to the motion and the basis for this Appeal.

Turner v. Burlington Northern R. Co. 771 F.2d 341 (1985) might also be used for the Dicta concerning the possible jury availability for the issues of the understanding and intent of the parties. It is submitted that an attorney operating as an agent should be restricted to the same principal agent principles as in any other situation without adding authority merely because he is an attorney. The issue on appeal is not the withdrawal of the attorney or grounds therefore, but the mere fact of its occurence without more served to prejudice the rights of the defendants.

It is further stated that in Wood v. Virginia Hauling Co., 528 F.2d 423, 425-26 (4th Cir. 1975), the United States Court of Appeals Stated:

> "The task of the District Court upon remand is to find, if he can, the terms of the complete settlement agreement or determine that there was none. A settlement agreement by definition should end litigation. Court Clerks and Federal Judges cannot monitor the disintegration of a course of action by bits and pieces. There is no such thing as half settlement or even 95 percent settlement."

In this case, this elementary principle was not followed and the motions of appellants to amend its answer to allege by new counsel affirmative defenses, setoffs and counterclaims was denied even when the original attorney never alleged any setoffs, affirmative defenses, or counterclaims. The court of Appeals in the Eight Circuit on page (4) stated, "We argue with EGB that Crass's reply was not an acceptance but a Counteroffer, which EGB rejected." Where is the contract??" Wang Lab, Inc. v. Applied Computer Sciences, Inc. 958 F.2d 355, refused to grant summary judgment to enforce an unexpected settlement agreement when the court had been advised that the case had been settled. At page 359 the court stated: The issue we must resolve is whether Wang and ACS should be bound to the terms and conditions of the unexecuted April 25 draft settlement agreement when there was never a meeting of the minds. Ozy-agcilar v. Davis, 701 F.2d 306,308 (4th Cir.1983). See also Callie v. Near, 829 F.2d 888, 890 (9th Cir.1987). It does not have the power to make an agreement for the parties or to decide, contrary to the facts and the law, that a draft settlement agreement was binding when the parties did not agree on it. Ozyagcilar, 701 F.2d at 308. See also Callie, 829 F2.d at 890.

Without an existent counterclaim in the original pleadings, and even when the same was interposed, the District Court by law in enforcing the settlement imposed a court settlement even without the right of a hearing.

B. The Eight Circuit courts decision finds a settlement or contract on the basis of an offer and counter-offer and is contrary to contract law and conflicts with decision of this court and other courts.

It must be stated that the granting of authority must preliminarily be determined before we can even approach the existence Vel Non of a settlement agreement. This agency principle was side-stepped an appeal with the Court of Appeals in a footnote stating, (4)" On Appeal, EGB also challenges Cearley's authority to settle. Because EGB did not raise this issue in the district court, we do not address it on appeal." This in effect sidesteps the first issue that would be determined in a plenary hearing and the court of Appeals aptly described the statement of Cearley as "Boot Strapping". Proof of one's authority without other extrinsic evidence is ineffectual.

A decision of this court is desperately needed for guidance concerning the role of an attorney in effectuating a compromise or a settlement. Under present circumstances, an attorney acting as an agent negotiating a statement is placed in serious jeopardy of acting beyond the scope of his authority or claims that he is acting without authority at all. Although the answer may be legislation, Judicial directions that Due Process requires an evidentiary hearing, a Judicial fact facting or plenary hearing is of necessity to protect our system, it's attorneys and the parties involved.

Perhaps a Judicial directive that settlement agreements be made subject to Statute of Frauds with the operative compulsory counterclaim incorporated with the operative verbiage can solve this dilema.

Compulsory Counterclaim statutes in se change the substantive content of a settlement agreement.

In the instant case there are two statutes reflective of the substantive content of the nature of the settlement. An Arkansas Statute which has been appended and The Federal Rule of Civil Procedure 1 (a). It is unknown which is the operative section and argually an absent fact. Was state law or Federal law applying and was this understood by the parties - and specifically EGB. We submit it was not and submit this is not known to the district court or the court of appeals and will never be known without Due Process mandating an evidentiary hearing.

We take the position that EGB by filing an amended answer neither knew of the compulsory counterclaim statutes with their full ramifications and certainly never intended they should apply. Gatz v. Southwestern Bank, 386F 2d 1089 certainly mandates that this understanding of E.G.B. should have been elicited.

This is an appropriate case for consideration by the United States Supreme Court.

We submit that the Due Process provisions requires and mandates hearings.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Eight Circuit in this case.

Respectfully submitted,

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Dated December 14, 1993

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH DISTRICT

No. 92-2932

TCBY Systems, Inc.,an Arkansas Corporation;
TCBY Enterprises, Inc., a Delaware Corporation,
Appellees,

v.

EGB Associates, Inc. a New York Corporation;
Charles R. Hart, Citizen of New York;
Donald F. Hart, Citizen of New York;
Brian Hart, Citizen of New York;
William D. Hart, Citizen of New York,
Appellants.

Appeal from the United States
District Court for the
Eastern District of Arkansas

Filed: August 16, 1993

Before McMillian, Circuit Judge, Henley, Senior Circuit Judge, and BEAM, Circuit Judge.

Per CURIAM.

EGB Associates, Inc. and Charles R., Donald F. Brian and William D. Hart (collectively referred to as "EGB") appeal from the district court's judgement enforcing a settlement agreement. We affirm in part and reverse and remand in part.

In April 1991, TCBY Enterprises, Inc. (collectively referred to as "TCBY") filed suit against EGB alleging

Lanham Act Violations, unfair competition, breach of contract and guaranty, and failure to pay certain fees owed as franchisees. EGB answered, specifically reserving the right to plead further by amended answer or counterclaim.

On September 18, 1991 Robert M. Cearly, Jr., EGB's attorney, wrote a letter to Kevin Crass, TCBY's attorney, stating, "I am authorized to offer (and do offer) $28,000.00 in full settlement of all issues between our clients. We are in a position to close this out quickly , if this offer is acceptable." On September 20, Crass responded by letter: "In exchange for mutual releases, TCBY accepts the offer expressed in your letter of September 18, 1991 I will send you a proposed release in the next few days." On September 26, Crass sent a proposed settlement agreement with release to Cearley's clients, they should sign it and forward it with the settlement funds. He added: "If the proposed Agreement is not acceptable, please let me know." The agreement required EGB to pay TCBY $28,0000.00 and to completely "de-identify" former TCBY stores in accordance with TCBY franchise agreements. The agreement also provided for a relaese of "all claims and demands of whatever nature [EGB has] or may have had against [TCBY] . . ., including any claims or demands arising out of the actions which are the basis of the claims" in the pending lawsuit.

On November 4, Ceraley wrote Crass to confirm their recent telephone conversations in which he had advised Crass that EGB was not willing to sign a standard release, TCBY agreed to "dismissal of the claims in exchange for $28,000.00" and attached a proposed order of dismissal provided that the district court would "dismiss all claims pending before the court, and all claims arising out of the transaction or occurence that is the subject matter of this lawsuit with prejudice"

On December 11, Crass wrote to Cearley inquiring about payment of the funds, noting that Cearley had indicated that EGB could be expected in the near future." On January 2, Crass wrote again and told Cearly that, based on the agreement to settle, TCBY had not conducted discovery and had informed the district court that the case had been settled. On January 21, 1992, TCBY filed a motion to enforce settlement and attached the above- described correspondence. EGB, represented by new counsel, opposed the motion, asserting that it understood the settlement was to "encompass only the exsisting claim and at no time envisioned a release of all claims." EGB also requested leave to file an amended answer which included affirmative defenses and counterclaims against TCBY. The proposed counterclaims alleged that TCBY fraudulently included EGB into entering franchise agreements and breached those agreements.

The district court summarily granted TCBY's motion to enforce settlement, finding that an agreement had been reached on September 20 when Crass accepted Cearley's offer of September 18 to settle "all issues" for $28,000.00. The court entered judgement against EGB for $28,000.00 and ordered EGB to execute the agreement and general releases which TCBY had forwarded to Cearley on September 26, but which EGB had rejected.

On appeal, EGB argues that the district court erred in granting TCBY's motion to enforce settlement, asserting there was no "meeting of the minds" as to the terms and scope of a settlement agreement. EGB suggests that Crass's reply of September 20 was not an acceptance of Cearley's offer of settlement, but a counteroffer which conditioned the dismissal on execution of mutual releases.

EGB notes that in Crass's letter of November 4 TCBY acknowledged and accepted EGB's refusal to execute the settlement agreement and general release. We agree with EGB that Crass's reply was not an acceptance but a counteroffer, which EGB rejected. The district court therefore erred in ordering EGB to execute the draft agreement. A district court "does not have the power . . . to decide . . . that a draft settlement agreement was binding when the parties did not agree on it." Wang Lab., Inc. v. Applied Computer Sciences, Inc., 958 F.2d 355, 359 (Fed. Cir. 1992). Accordingly, that portion of the judgement ordering EGB to execute the draft settlement agreement and release is vacated.

Although we find that the district court exceeded its authority in ordering EGB to execute the agreement and release, we nonetheless find that the parties reached an agreement to dismiss the lawsuit with prejudice. On November 4, Cearley wrote thatEGB "agree[d] to the payment of $28,000.00 and the dismissal with prejudice of the pending lawsuit." On November 11, Crass accepted th eoffer of "dismiassal of the claims in return for $28,000.00," and forwarded a proposed order of dismissal. The proposed order was not a general release of "all claims and demands of whatever nature [EGB] h[as] or may have had against" TCBY. Rather, the proposed order stated the legal effect of a dismissal with prejudice on a compulsary counterclaim. The order provided for the dismissal of "all claims pending before the Court, and all claims arising out of the transaction or occurrence that is the subject matter of this lawsuit with prejudice." The language of the order tracks Fed. R. Civ. P. 13 (a), which provides that a counterclaim is conpulsary "if it arises out of the transaction or occurence that is the subject matter of the opposing party's claim."[1]

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(1) We note that Arkansas also has a compulsory counterclaim rule. See Ark. R. Civ. P. 13 (a).

On appeal, EGB doea not dispute that "[a] dismisssal with prejudice has the effect of a final adjudication on the merits." Nemaizer v. Baker, 793 F2d 58, 60)2d Cir. 1986). Nor does EGB dispute that "[a] counterclaim which is compulsary but is not brought is therafter barred." Baker .v. Gold Seal Liquors, Inc., 417 U.S. 467, 469 n.1 (1974).[2] Instead, EGB appears to argue that at the time it agreed to a dismissal with prejudice it did not understand the preclusive effect of a dismissal with prejudice and only intended to dismiss the complaint.[3] EGB asserts that the district court erred in failing to hold an evidentiary hearing as to its intent and that its misunderstanding is a "mistake" sufficient to void the agreement.[4]

As a general rule, a "district court must hold an evidentairy hearing . . . when there is a substantial factual dispute concerning the exsistance or terms of the settlement agreement . . . ." Gatz v. Southwest Bank, 836 F.2d 1089, 1095 (8th Cir. 1988). However, in this case, EGB's misunderstanding as to the legal effect of adismissal with prejudice does not warrant a hearing. See id. (hearing unnecessary on subjective intent as to scope of settlement agreement.) Nor is the misunderstanding as to the legal effect of the dismissal sufficient to void the agreement to dismiss the compliant with prjudice. See id.

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(2) EGB appears to characterize its proposed counterclaims as compulsory. We do not decide whether the counterclaims are compulsory or permissive.

(3) In its correspondence, EGB never proposed reserving any counterclaims. See Rosebud Sioux Tribe v. A&P Steel, Inc., 874 F2d 550, 553 (8th Cir. 1989) (agreement provided that the "settlement does not include this counterclaim, and the counterclaim is to be left pending for a trial").

(4) On appeal, EGB also challenges Cearley's authority to settle. Because EGB did not raise this issue in the district court, we do not address it on appeal.

This case is similair to Nemaizer v. Baker, 793 F2d at 63. In Nemiaizer, the parties agreed to dismiss a pending suit with prejudice. Six months later the plaintiff filed a second suit. The district court indicated that the suit was subject to dismissal on res judicata grounds. The plaintiff filed for relief from the dismissal under Fed. R. Civ. P. 60 (b), arguing that counsel in the original action did not understand the res judicata effect of the dismissal. The district court granted the motion, finding "a genuine misunderstanding had occurred concerning the stipulation's scope." Id. at 60. The Second Circuit reversed. The court found that the counsel's misunderstanding could not void the agreement, even though "the consequences of entering into the [the] agreement were not fully weighed" and"the choice was poor.' Id. at 62. The court held that the dismissal with prejudice "served notice that basic rs judicata principles would bar future actions." Id. See also Samuels v. Northern Telecom, Inc. 942 F.2d 834, 837 (2d Cir. 1991) ("res judicata may not be avoided on the basis of . . . an encompasing stipulation of withdrawal with prejudice.") ; Citibank v. Data Lease Fin. Corp., 904 F2d 1498, 1504 (2d Cir. 1990) ("it is clear that data Lease did not intend that the stipulated dismissal with prejudice would constitute a final judgement of a particular issue . . . [but] that intent does not eliminate the res judicata or claim preclusion effect . . . of the final judgement").

In conclusion, we hold that EGB agreed to dismiss the lawsuit with prejudice for $28,000.00. Accordingly, we affirm that portion of the district court's judgement against EGB for $28,000.00. We, however, reverse and vacate that portion of the judgement requiring EGB to execute the draft settlement agreement and release, which EGB had expressly rejected, and remand with directions to the district court to enter a dismissal with prejudice.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. LR-CV-91-224

TCBY SYSTEMS, INC. an Arkansas corporation and
TCBY ENTERPRISES, INC., a Delaware Corporation
Plaintiffs,

v.

EGB ASSOCIATES, INC., a NewYork Corporation,
CHARLES R.HART,
DONALD F. HART,
BRIAN HART,
WILLIAM D. HART,
citizens of New York
Defendants,

JUDGMENT

Pursuant to this Court's Order of April 23, 1992 granting the Motion to Enforce Settlement Agreement. TCBY Enterprises, Inc. and TCBY Systems, Inc. are entitled to and hereby given Judgment against EGB Associates, Inc., Charles R. Hart, Donald F. Hart, Brian Hart and William D. Hart, jointly and severally, in the amount of Twenty-Eight Thousand Dollars ($28,000) plus interest to accrue per annum at 3.51% until satisfaction of the Judgment. Further, EGB Associates, Inc., Charles R. Hart, Donald F. Hart, Brian Hart and William D. Hart are hereby ordered to execute the Settlement Agreement and Release of Claims attached hereto

as Exhibit "A" in compliance with the settlement agreement of the parties.

It is so ordered this 31 day of July, 1992.

/s/ George Howard Jr.
DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

Civil No. LR-CV-91-224

TCBY SYSTEMS, INC., Et Al.
Plaintiffs,

v.

EGB ASSOCIATES, INC., ET AL.
Defendants,

ORDER

Plaintiffs, which initially filed suit on April 15, 1991, filed an amended complaint on April 19, 1991, alleging violations of the Lanham Act, unfair competition, violation of the Arkansas Anti-Dilution Act, breach of contract and guaranty, and payment of royalty and advertising fees. Defendants answered on May 24, 1991, specifically reserving the right to plead further by amended answer or counterclaim. By order filed on June 17th, the case was scheduled for trial to commence on January 21st. Prior to trial, the Court was advised that a settlement had been reached and so the case was removed from the trial calendar.

On January 21st, plaintiffs filed a motion to enforce settlement agreement supported by brief and exhibits. On January 22nd, Robert M. Cearley, Jr., who was then counsel for defendants, filed a motion to withdraw on the ground that an irreconcilable conflict of interest had arisen between him and his clients that would not permit him to continue representing them in a manner consistent with the Rules of Professional Conduct.

On February 3rd, Thomas R. Snow of Frank C. Kiepura and Associates of New York moved to be substituted as counsel and for leave to file an amended answer with counterclaims. By order filed on February 18th, Cearley was permitted to withdraw and Snow was substituted as counsel for defendants. After receiving several extensions, defendants filed their response on March 25th.

Plaintiffs assert that the series of letters beginning with the September 18th letter from Cearley to plaintiffs' counsel in which he states "I am authorized to offer (and do offer) $28,000.00 in full settlement of all issues between our clients," reflect that a settlement had been reached. Defendants counter that there was a mutual mistake since they did not intend to give up whatever claims they might have against plaintiffs.

Omitting citations, Gatz v. Southwest Bank of Omaha, 836 F.2d 1089 at 1095 (8th Cir. 1988) provides:

A district court has the inherent power to summarily enforce a settlement agreement as a matter of law when the terms of the agreement are clear and unambiguous. *** The district court must hold an evidentiary hearing, however, when there is substantial factual dispute concerning the existence of terms of the settlement agreement, ... or when the situation presents complex factual issues ...."

Gatz affirmed the Nebraska district court's summary findings made without a hearing that the scope of the settlement agreement was clear and unambiguous, parol evidence of the respondent's subjective intent was inadmissable, and a mutual mistake was required to impeach a settlement agreement in the absence of inequitable conduct.

In Turner v. Burlington Northern R.R. Co., 771 F.2d 341, 345-346 (8th Cir. 1985), the following passage with citations omitted discusses the burden of establishing the validity of a settlement agreement:

> Once it is shown that an attorney has entered into an agreement to settle a case, the party who denies that the attorney was authorized to enter into the settlement has the burden to prove that authorization was not given. ** To prevail on his claim that his attorney lacked authority to enter into the settlement Turner carries "a heavy burden to establish that [his attorney] acted without any kind of authority in agreeing to [the settlement]." *** Turner must establish "through competent evidence that [his] attorney lacked ... authority" to enter into the agreement.

The case McKenzie v. Boorhem, 117 F.Supp. 433 (W.D. Ark. 1954) contains the following language, again with citations omitted:

> Under Arkansas law, an attorney has no implied authority to enter into a compromise agreement. *** However, when a client gives his attorney specific authority to enter into a compromise agreement, such an agreement, if entered into by the attorney, is valid and binding. Id., at 435.
>
> ***
>
> The agreement was complete and binding at that time, and the fact that the written agreement tendered to Boorhem for signing might not have conformed to the oral settlement agreement would not in any wise affect the validity of said oral agreement. Id., at 436. See also, Boyd v. Larco-Industrial Painting Corp., 356 F.Supp. 917 (W.D. Ark. 1973); Veasey v. Joshlin, 257 Ark. 422, 516 S.W.2d 596 (1974).

Defendants have not argued that Cearley did not have authority to settle the case. Instead, they contend that they only meant to resolve plaintiffs' direct claims against them, that it became apparent when the releases were forwarded to them that plaintiffs wanted to preclude any claims defendants might have against plaintiffs, and that it then became clear that the Arkansas compulsory counterclaim statute might preclude defendants from asserting any claim against plaintiffs under the doctrines of res judicata or collateral estoppel. Defendants state that New York does not have a compulsory counterclaim statute and so defendants should be permitted to interpose a proper defense with affirmative defenses and counterclaims so that all claims arising out of the parties' transactions can be settled or tried in their entirety. In sum, defendants assert that there was never a mutual meeting of the minds as to the proposed settlement so there is no settlement as a matter of law and the issue of the understanding and the intent of the parties might be a question of fact to be determined by a jury.

When the legal principles outlined above are applied to the facts, as established by the exhibits, it is clear that Cearley had authority to settle the case, that the terms of the settlement encompassed the resolution "of all issues between our client," and that there is an absence of mutual mistake or inequitable conduct. Furthermore, the subsequent letters reveal plaintiffs' attempts to accommodate defendants' objections to the language of the releases and defendants' effort to gather the settlement funds. Under these circumstances, the settlement agreement that all disputes between the parties will be settled in exchange for the payment of $28,000.00 by defendants will be enforced.

Accordingly, plaintiffs' January 21st motion to enforce settlement agreement is granted. Defendants are directed to comply with the agreement embodied in the September 18th letter and the appropriate documentation to close this case must be submitted by the parties within 20 days from the file-date of this order. Defendants' February 3rd motion for leave to file an amended answer with counterclaims is denied.

It is so Ordered third 22 day of April, 1992.

/s/ George Howard Jr.
UNITED STATES DISTRICT JUDGE

FEDERAL RULES OF CIVIL PROCEDURE

Rule 13. Counterclaim and Cross-Claim

(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which, at the time of serving the pleading, the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon the claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgement on that claim, and the pleader is not stating any counterclaim under this rule 13.

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